

LAW OFFICE OF
HARRY KRESKY

250 WEST 57TH STREET, SUITE 2017, NEW YORK, NY 10107
TELEPHONE: 212-581-1516 FAX: 212-581-1352 E-MAIL: HARRYKRES@AOL.COM

August 5, 2004

BY OVERNIGHT DELIVERY

General Counsel
Federal Election Commission
999 E. Street, NW
Washington, DC 20463

Dear Sir or Madam:

I am counsel for complainants Lenora B. Fulani and Committee for a Unified Independent Party.

Please accept their complaint for filing. An original and three copies is enclosed pursuant to 11 C.F.R. Sec. 111.4.

Sincerely yours,



Harry Kresky

RECEIVED
FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL

2004 AUG -6 A M: 29

25044111395

THE FEDERAL ELECTION COMMISSION

-----X
LENORA B. FULANI and COMMITTEE
FOR A UNIFIED INDEPENDENT PARTY,

Complainants,
-against-

JOHN F. KERRY, JOHN EDWARDS and
DEMOCRATIC NATIONAL COMMITTEE,

Respondents.
-----X

VERIFIED COMPLAINT

MUR# 5509

2004 AUG - 6 A 11: 29

RECEIVED
FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL

This complaint alleges a concerted effort to deny ballot access to Ralph Nader and his running mate, Peter Camejo and the use of public convention funding and the likely use of general election funding in this effort. Respondents and Democratic Party officials acting on their behalf in various states have manipulated ballot access laws and administration and resorted to intimidation, obstruction and, on information and belief, illegal use of government employees, in their effort to gain partisan advantage by depriving Mr. Nader, Mr. Camejo and their supporters, and voters across the country of the opportunity to run for the office of President of the United States and support and vote for the candidate of their choice.

1. Complainant Lenora B. Fulani, residing at 560 W. 43 St., NY, NY 10036, is a citizen of the State of New York and a support of Ralph Nader's campaign for the presidency.

2. Complainant Committee for a Unified Independent Party ("CUIP"), incorporated under the Not for Profit Corporation Law of the State of New York and exempt from taxation pursuant to Section 501(c)(4) of the Internal Revenue Code, whose principal place of business is at 225 Broadway, NY, NY 10007, is a national not-

2504111396

for-profit organization whose purpose is to expand political participation, open up the electoral process and promote fairness for all voters and candidates regardless of party affiliation or non-affiliation. Complainant Fulani is the President of CUIP.

3. On May 19, 2004 and June 8, 2004 complainant Fulani wrote to the Bradley Smith the Chairman of the Federal Election Commission ("FEC" or "Commission") and the other Commissioners expressing concern over efforts by the Democratic Party to prevent Ralph Nader from gaining ballot access in various states and urging the Commission to express its disapproval of such efforts and their incompatibility with the intent of Congress in providing convention and general election funding to the Democratic Party and its convention and presidential candidate. (Copies of these letters are annexed)

4. In a telephone conversation with complainants' counsel, on or about June 23, 2004, Lorenzo Holloway of the Office of General Counsel stated that the issues raised by Complainant Fulani in her letters of May 19 and June 8 would not become ripe for consideration by the Commission until such time as John Kerry received the nomination of the Democratic Party and sought general election funding.

5. On June 29, 2004 Mr. Kerry accepted the nomination and applied for funds, and on June 30, 2004, according to the Commission's news release, Kerry's eligibility was certified and the U.S. Treasury was notified to wire \$74.692 million of public moneys into the account of the Kerry-Edwards campaign.

6. However, the issues raised by complainants concerning the eligibility of the Kerry-Edwards campaign for public funding are still the proper subject of Commission inquiry through the MUR process. *See, in re Carter-Mondale Reelection*

Committee, Inc. v. Federal Election Commission, 642 F.2d 538 (1980).

7. In recent weeks it has become apparent that a central element of the Kerry-Edwards campaign's strategy for winning the 2004 presidential election is to deprive the Nader-Camejo ticket of a place on the November ballot in as many states as possible. This is unprecedented in a presidential election.

8. On information and belief, according to press reports, such efforts have been undertaken by Democratic Party leadership in Arizona, Colorado, Illinois, Michigan, Missouri, Nevada, New Jersey, New Mexico, Oregon, Pennsylvania and South Carolina and Texas.

9. The Nader campaign reports that in each state they file Democratic Party lawyers go over its petitions with a fine tooth comb.

10. According to an article on page A14 of the August 2, 2004 *New York Times*, former Congressman Toby Moffet is co-ordinating these efforts on a national level. According to the *New York Times*:

Mr. Moffet said that he and Elizabeth Holtzman, the former Congresswoman from New York were coordinating with election lawyers in several states to challenge Mr. Nader's ballot petitions. Their strategy he said, is to try to undercut Mr. Nader not only in swing states where he could make a difference, but in safe states, "to drain his resources and force him to spend time and money."

11. The July 29, 2004 issue of *Business Week* quotes Democratic National Committee Chairman Terry McAuliffe, as stating, "We can't afford to have Ralph Nader in the race."

12. In some cases the campaign against Nader and Camejo has gone beyond ballot challenges. In Charleston, West Virginia the county prosecutor announced an investigation into the activities of Nader signature gatherers, (*Associated Press*, July 18,

2004) In Oregon the Multnomah County Democratic Party organization in Portland obstructed Nader's effort to meet the state's unique ballot access requirement of a nominating caucus with 1,000 registered voters in attendance who express their support for the candidate. Democratic Party activists were organized to attend the meeting, pack the room and then refuse to support Nader; his organizers ended up with 1,130 people in attendance but faced the danger that fewer than 1,000 supported the candidate. (*The Oregonian*, July 23, 2004) In Illinois, on information and belief, government workers in the office of House Speaker and Democratic Party State Chair Michael Madigan have, according to Mr. Nader, been assigned to work on the petition challenge.

13. Prior to the convention, DNC Chairman Terry McAuliffe insisted that neither the DNC nor the Kerry campaign is funding the effort.

14. However, at the recent Democratic Party convention in Boston Mr. Moffett and others coordinated a variety of anti-Nader activity, including the recruiting and training of lawyers to work to keep the Nader-Camejo ticket off the ballot, *New York Times, supra*; UPI, July 29, 2004.

15. Inasmuch as the convention was paid for with public funds through the Commission's program for Federal Financing of Presidential Nominating Conventions, the FEC has an interest in how these funds are being used.

16. The same of course is true of the Kerry-Edwards general election effort.

17. The Nader-Camejo campaign has qualified for primary matching funds for its ballot access effort.

FIRST LEGAL CLAIM

18. Complainants re-allege the allegations in paragraphs 1 through 17 above as if fully set forth herein.

19. Unquestionably, the government itself could not act with the intent and effect of restricting competition in the electoral arena. This would violate the First Amendment. It follows that a campaign funded by the government cannot act in such a manner, directly or indirectly.

20. By supporting and encouraging efforts to deny Nader-Camejo ballot access, the Kerry-Edward campaign and the national Democratic Party have violated the civil rights statutes that prevent persons acting under color of state law, or participating in a conspiracy, to deprive others, in this case Nader-Camejo and their supporters, of their constitutionally protected rights and freedoms.

21. In the late 1940's Democratic Party organizations in the South were held accountable under these statutes for barring participation by African-Americans in "all white" primaries. Efforts to deny Nader and his supporters the opportunity to appeal directly to the American voters is likewise an infringement of their civil rights and the rights of independent voters for whom the campaign speaks. It is appropriate for the FEC to revoke or demand repayment of the public funding to the Kerry-Edwards campaign and the Democratic Party.

25044111400

SECOND LEGAL CLAIM

22. Complainants re-allege the allegations in paragraphs 1 through 17 and 19-21 above as if fully set forth herein.

23. To the extent that activities of the sort described above took place at or were furthered by conduct taking place at the Democratic Party nominating convention, they gave rise to expenditures that are not permitted under 11 CFR Sec. 9008.7.

24. To the extent that the Kerry-Edwards campaign directly or indirectly uses general election funding in efforts to deprive Nader-Camejo of ballot access, they are making expenditures that are not qualified campaign expenditures under 11 CFR Sec. 9002.11 as they are not made to "further a candidate's campaign for election to the office of President or Vice President of the United States."¹

25. FECA further defines qualified campaign expenditures as those where: "neither the incurring nor payment of which constitutes a violation of any law of the United States or of the State in which such expense is incurred or paid." 2 U.S.C. Sec. 9002(11)(c); 11 CFR Sec. 9002.11. It appears that convention funding has been spent in support of efforts to deprive the Nader-Camejo campaign of a place on the ballot, and to the extent that such an effort is an integral part of the Kerry-Edwards campaign's strategy to win the White House, it is likely that general election funds will be spent directly or indirectly to accomplish this end. As indicated above such a strategy runs afoul of the Civil Rights Statutes. Further, actions such as that described in paragraph

¹While the Commission's regulations contain no explicit bar to using public funds to impede another candidate's effort to gain a place on the ballot, it is significant that the New York City Campaign Finance Program contains an explicit prohibition. Rule 1-88(g)(2)(x). Such a prohibition should be read into the Commission's regulations to prevent the misuse of public funds.

12 above violate applicable state and local law.

Dated: New York, N Y
August 5, 2004

Law Office of Harry Kresky
Attorney for Complainants
250 W. 57th St. (Ste. 2017)
New York, NY 10107
(212) 581-1516


by Harry Kresky

25044111402

INDIVIDUAL VERIFICATION

STATE OF NEW YORK)


ss.:

COUNTY OF NEW YORK)

LENORA B. FULANI, being duly sworn, deposes and says that she is the complainant herein; that she has read the foregoing complaint and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes them to be true.


LENORA B. FULANI

Sworn to before me this
August 5, 2004


HARRY KRESKY
Notary Public, State of New York
No. 02KR7366215
Qualified in New York County
Commission Expires Feb. 28, 2007



THE COMMITTEE FOR A UNIFIED INDEPENDENT PARTY

May 19, 2004

Mr. Bradley A. Smith
Chairman
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Dear Chairman Smith:

I am writing to draw the attention of the Commissioners to possible unconstitutional practices by the Democratic Party which should disqualify it from receiving any public subsidy in the 2004 election cycle, should they come to pass.

The two major parties have, since the passage of the Federal Election Campaign Act ("FECA") in 1971 been the beneficiaries of enormous public subsidy. Every four years their presidential campaigns receive general election funding. This year each party will receive some \$75 million. FECA requires those funds to be spent to "further... the election of the candidate of such political party for the office of President," (26 U.S.C. Sec. 9002(11)), and has stringent reporting and auditing requirements to ensure that the money is not spent otherwise. FECA and the regulations adopted by the Federal Election Commission ("FEC") also contain a myriad of other requirements to which those participating in this federally funded activity are subject.

The rationale for this government largesse to the two dominant parties has been identified as its role in, "opening up the process, reducing the undue influence of individuals and groups, and virtually ending corruption in presidential election finance." (Report of the bipartisan Commission in National Elections, quoted in 94 Colum.L.Rev. 1143 (1994)). Yet these same parties often act in ways that are intended to and have the effect of limiting access to the presidential arena by undermining the development of competing parties and candidates.

This year such efforts have been directed at the independent presidential campaign of Ralph Nader. Fearful that a Nader campaign will take votes away from their nominee, leading Democrats urged Nader not to run, claiming that his votes in 2000 provided Republican presidential candidate George W. Bush with his margin of victory. Mr. Nader takes issue with this "spoiler" characterization of his effort, noting that this suggests that Democrats and Republicans occupy a preferred position in the electoral process, that one of them has a claim on certain voters and anyone else who seeks their support is doing

something improper.

Now that Mr. Nader has begun his campaign, some leading Democrats have threatened to take the necessary steps to deny him ballot access. This, of course, is no idle threat. In most states the election laws are administered by either a Board of Elections or a Secretary of State, offices whose occupants are invariably partisans of one of the two major parties. Moreover, the formidable signature requirements for an independent candidate (64,077 over a 55 day period in Texas, 153,035 over a 105 day period in California) along with various technical requirements (in Texas a voter cannot sign a petition if he or she voted in the March presidential primary) create a situation where close scrutiny of the nominating petition (especially through the eyes of a partisan office holder) can result in the elimination of enough signatures so that the threshold requirement is not met. In some states like New York and Illinois a petition can be challenged by an individual and a time consuming and expensive court proceeding commenced to remove the candidate from the ballot. In each state there is a history of partisan operatives bringing such challenges against insurgent and independent candidates.

Thus, on the eve of the Oregon caucus organized by Nader supporters who needed to gather 1,000 voters under a single roof, Howard Dean, who contended for the Democratic Party nomination and then dropped out to support John Kerry, urged Oregon voters to boycott the Nader caucus (*USA Today*, 4/5/04). The Nader effort fell short by 259 voters. Dean's statements may well have been the cause. In an appearance on *Meet the Press* March 7, 2004 Democratic Party consultant James Carville stated:

Every person thinking about Ralph Nader should be very cognizant of that, that a vote for Nader is a vote for Bush. A signature on a petition to allow him to run is in essence a vote for Bush.

On March 21, 2004 (p. 16) the *New York Daily News* reported that the executive director of the Pennsylvania Democratic Party stated:

This time, we're going to make it clear how dangerous he is. Early on, we'll be out there in the hinterlands telling everyone that a Nader vote is a Bush vote.

Will these Democrats rely on their party's proven capacity to manipulate ballot access requirements to their advantage and the disadvantage of insurgents and independents? This raises some important concerns. It is surely not the intent of the U.S. taxpayers who fund these massive subsidies to the major parties, for their dollars be used to limit their choices in November. Nor was it their intent to fund a political duopoly that operates to suppress competition.

There is an important role for the FEC, given its broad mandate to regulate campaign contributions and expenditures and, in particular, the uses to which public funds are put, to take such steps as are necessary to insure that the recipients of public funding do not use such funding directly or indirectly to limit access to the ballot and deny Americans the full

and robust democracy to which the Constitution entitles them. Unquestionably, the government itself could not act with the intent and effect of restricting competition in the electoral arena. This would violate the First Amendment. It follows that a campaign funded by the government cannot act in such a manner, directly or indirectly.¹ To the extent that the Kerry campaign or the Democratic Party supports or encourages efforts to deny Nader ballot access they will, I respectfully submit, be subject to the civil rights statutes that prevent persons acting under color of state law from depriving others of their constitutionally protected rights and freedoms.

In the late 1940's Democratic Party organizations in the South were held accountable under these statutes for barring participation by African-Americans in "all white" primaries. Efforts to deny Nader and his supporters the opportunity to appeal directly to the American voters is likewise an infringement of their civil rights. It would be appropriate for the FEC to deny public funding to the Kerry campaign and the Democratic Party should they act in this manner. A public statement by the Commissioners to this effect could be of great significance in assuring that the 2004 presidential election is fair, open and democratic.

Respectfully,

Lenora B. Fulani
President

¹ Significantly, FECA further defines qualified campaign expenditures as those where, "neither the incurring nor payment of which constitutes a violation of any law of the United States or of the State in which such expense is incurred or paid " 2 U.S.C. Sec. 9002(11)(c). The major parties have shown themselves to be adept at manipulating

their finances to evade FEC requirements, and it is unlikely that the Kerry campaign can be shown to have spent federal money to deny Nader a ballot line. However, to the extent that such an effort is an integral part of the campaign's strategy to win the White House, an argument can be made that public funds contributed, at least indirectly, to this.



THE COMMITTEE FOR A UNIFIED INDEPENDENT PARTY

June 8, 2004

Mr. Bradley A. Smith
Chairman
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Dear Chairman Smith:

On May 19, 2004 I wrote to you and the other Commissioners concerning the possibility that Democratic Party operatives would engage in an effort to keep Ralph Nader off the ballot in various states.

Since then, that possibility appears to have materialized. The May 24, 2004 issue of *Time Magazine* reports that Jim Pederson, the Democratic Party state chair in Arizona, a "battleground" state, has "...assembled a team of lawyers to look at every one of the signatures Nader collects. Our first objective is to keep him off the ballot," Pederson says. "This vote is about George Bush and John Kerry, and we think it distorts the entire electoral process to have his name on the ballot."

Last week, in the June 3, 2004 issue of the *New York Sun*, Jerry Goldfeder, an election lawyer with close ties to the New York Democratic Party organization, wrote:

As politically incorrect as it might seem, therefore, if Mr. Nader wants to attract votes in an election that promises to be hair-splittingly close, let him earn his place on the ballot.

If he hasn't complied with a state's election law, Democratic election lawyers should demand that the courts knock him off.

I am sure the Federal Election Commission does not endorse Mr. Pederson's position that a Nader candidacy "distorts" the ballot nor that an undistorted ballot requires a frontal attack on Nader's right to run for office. As the federal agency charged with oversight of the

federal election process, and the primary funding source for the Democratic Party presidential effort, it is imperative that the FEC forcefully and publicly speak out on behalf of the public interest in democratic choice and make clear to Mr. Kerry that efforts by his campaign and party to prevent this will not be tolerated.

Respectfully,

Lenora B. Fulani
President

cc: Vice Chair Ellen Weintraub
Commissioner David Mason
Commissioner Danny McDonald
Commissioner Scott Thomas
Commissioner Michael Toner